2-1005-8350-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF COMMERCE

In the Matter of Beacon
Builders, Inc., a Minnesota corporation
RULING ON MOTION OF THE
DEPARTMENT OF COMMERCE TO
DISMISS THE HEARING REQUEST
OF BEACON BUILDERS, INC.

On August 27, 1993, the Commissioner of Commerce (Commissioner) issued a Cease and Desist Order and Notice of Right to Hearing in the above-captioned matter. The Cease and Desist Order and Notice of Right to Hearing was served on August 31, 1993, on Daniel J. Hughes, Beacon Builders, Inc., 905 Jefferson Avenue, St. Paul, Minnesota 55102, via certified United States Mail, restricted delivery. Daniel J. Hughes was listed on the state license of the company as the president of the corporation. On or about September 16, 1993, Frank Hughes, the father of Daniel J. Hughes, received the Cease and Desist Order and Notice of Right to Hearing from the United States Post Office, signing the name of Daniel J. Hughes on the return receipt request. On October 15, 1993, Frank Hughes submitted a written hearing request to the Commissioner, identifying himself as the "commercial accounts manager" of Beacon Builders, Inc. On October 19, 1993, Frank Hughes submitted a letter to the Department in which he, for the first time, identified himself to the Department as the president of Beacon Builders, Inc. On October 20, 1993, the Commissioner issued a Notice of and Order for Hearing naming Beacon Builders, Inc. and the Department of Commerce as parties.

A hearing on the above-captioned matter was held on October 21, 1993, at 1:00 p.m. At the hearing, the Department of Commerce made a multi-part oral motion seeking to dismiss the request for hearing filed by Frank Hughes on behalf of Beacon Builders, Inc. The Department argued that Mr. Frank Hughes could not represent the corporation in this contested case hearing since Mr. Frank Hughes was not an attorney licensed to practice law in the State of Minnesota. The Department also contended that the request for hearing was late-filed. Finally, the Department questioned whether Mr. Frank Hughes was the president of Beacon Builders, Inc. at the time he made the hearing request.

Because of statutory constraints on the required timeliness of the hearing, the Administrative Law Judge informed the parties

that he would take the oral motion under advisement and proceeded to take full testimony on the merits of the case. Mr. Frank Hughes was provided with an opportunity to obtain a continuance to engage an attorney at law to represent Beacon Builders, Inc. He stated on the record that he did not desire to do so even though the result of that refusal might, potentially, be a dismissal of his hearing request. Frank Hughes stated after being informed of the consequences on the record that he wished to proceed with a timely hearing and refused to ask for a continuance. The Administrative Law Judge advised him that a decision would be rendered on the Department's motion first and taking evidence on October 21, 1993, would in no way prejudice the Department's motion. Mr. Frank Hughes, on behalf of Beacon Builders, Inc., with full knowledge of the potential consequences, elected to proceed.

Mr. Daniel J. Hughes did not appear at the hearing. No attorney or other representative of Beacon Builders, Inc., other than Frank Hughes, appeared at the hearing. At the hearing on October 21, 1993, the Department requested a period of time within which to file a memorandum of law in support of its motion. It indicated that its memorandum might include an estoppel argument. The Administrative Law Judge agreed to allow additional time to support the motion, if Beacon Builders, Inc. and the Department of Commerce entered into a stipulation whereby Beacon Builders, Inc. could continue its business operations pending a resolution of the motion, at least.

On November 4, 1993, the Department filed a memorandum of law in support of its motion to dismiss. In that Memorandum, the Department argued that Beacon Builders, Inc. could only be represented in a contested case hearing by an attorney licensed in the State of Minnesota to practice law. It also argued that Mr. Hughes should be estopped from asserting that he was the president of Beacon Builders, Inc. for purposes of requesting a hearing. The Department dropped its argument that the hearing request was untimely. By written correspondence to the Administrative Law Judge, Mr. Frank Hughes filed a responsive argument in opposition to the State's motion to dismiss.

The record on the motion closed on December 20, 1993, with the receipt by the Administrative Law Judge of the responsive argument of Frank Hughes.

Based on the oral motion and subsequent memorandum of law of the Department, on the oral argument at the hearing held on October 21, 1993, on the responsive filing of Mr. Frank Hughes and on all the files and records herein, the Administrative Law Judge makes the following:

ORDER

1. The motion of the Department of Commerce to dismiss the request for hearing of Beacon Builders, Inc. on the ground that it was not represented at the hearing by an attorney at law licensed to practice in the State of Minnesota is DENIED.

2. The motion of the Department of Commerce to dismiss the

request for hearing of Beacon Builders, Inc. on the ground that Frank Hughes should be estopped from asserting his status as a corporate officer for purposes of requesting and/or maintaining a hearing to challenge the Cease and Desist Order of the Commissioner is DENIED.

3. Within 30 days of the date of this Order, the parties shall file simultaneous written briefs on the underlying issues raised at the hearing herein held on October 21, 1993.

4. This Order is effective immediately.

Dated this 21st day of January, 1994.

s/ Bruce D. Campbell

BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

For purposes of this Order, the Administrative Law Judge assumes that Mr. Frank Hughes is not an attorney at law licensed to practice in the State of Minnesota. Mr. Hughes, at the hearing, admitted that he was not so credentialed. The Administrative Law Judge also assumes that Beacon Builders, Inc. is a corporation of limited size with the shares of stock held in trust for the benefit of the immediate Hughes family, including several handicapped children, of Frank Hughes. Frank Hughes also testified at the hearing that he was the current president of Beacon Builders, Inc., as well as being its founder and guiding hand since the inception of the small home remodeling company. There is no evidence in the record that Mr. Hughes was not the president of Beacon Builders, Inc. at or about the time the Notice and Order for Hearing was issued and the contested case hearing was held. There is no evidence in the record of any conflicting interest on the part of Frank Hughes, the family trust, or the beneficiaries of the family trust in his representation of Beacon Builders, Inc. in this contested case proceeding. The purpose of the hearing is to determine whether the corporation should be allowed to continue its business.

For the reasons hereinafter discussed, the Administrative Law Judge determines that Mr. Hughes' representation of Beacon Builders, Inc., a closely held family corporation, as its president and under the facts of this administrative contested case hearing, does not constitute the unauthorized practice of law. The Administrative Law Judge further concludes that it is most appropriate to consider the corporate officer status of Mr. Frank Hughes at the time Beacon Builders received its authority to engage in home remodeling from the Department of Commerce in the separate contested case hearing currently scheduled specifically for that purpose, rather than to attempt to infer, in this proceeding, his status as a corporate officer in 1992 on the basis of affidavits submitted after the hearing with respect

to a period of time that has long since passed.

The Attorney General, on behalf of the Department of Commerce, argues that the representation of a corporation, even a closely held family corporation, by a corporate officer in a contested case proceeding, amounts to the unauthorized practice of law. The Department relies exclusively on the judicial model to equate this contested case proceeding to Minnesota judicial authority which relates to the conduct of civil proceedings in State district courts and the Minnesota appellate courts. The argument, reduced to its essence, is that the Supreme Court has exclusive authority to define the practice of law and that appearing on behalf of a separate legal entity termed a corporation in a contested case proceeding amounts to the unauthorized practice of law. Based on that conclusion, the Administrative Law Judge has been asked to treat the request for hearing and the representation by Mr. Hughes at the hearing as nullities.

Mr. Hughes argues that, at least with respect to a small family corporation, the president of the corporation should be allowed to appear on its behalf in an administrative contested case proceeding. Although Mr. Hughes recognizes the authority of the Minnesota court to prohibit the unauthorized practice of law by laymen in the district courts or the appellate courts, he maintains that different considerations apply in an administrative hearing where the rules of evidence do not strictly apply, procedure is more informal and the system was purposely designed to be an alternative to the rigidity of the formal judicial branch court system.

Minn. Rule pt. 1400.5800 (1991), provides:

> Parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law.

Minn. Rule pt. 1400.7100, subd. 5 (1991), provides:

> A party need not be represented by an attorney. If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.

Mr. Frank Hughes relies on both portions of the Rules of the Office of Administrative Hearings quoted for the proposition that he may represent Beacon Builders, Inc. in this proceeding, even though he is not an attorney.

The Rules of the Office of Administrative Hearings, however, could not permit what is otherwise prohibited as the unauthorized practice of law. Further, the Minnesota court, in a similar context, has specifically held that such language cannot authorize what would otherwise be prohibited as the unlicensed practice of law. Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 755 (Minn. 1992). The Rules of the Office of

Administrative Hearing preserve inviolate the constitutional right of an individual to represent himself or herself in a contested case proceeding. With respect to other representation, the determination must be left to a proper definition of the "unauthorized practice of law" in the specific context of an administrative hearing.

A definition of the unauthorized practice of law in the context of administrative proceedings must begin with Minn. Stat. 481.02 (1993), in which the Legislature has defined the unauthorized practice of law and has specifically exempted certain permitted actions. As will be discussed subsequently, there is some dispute over the authority of the Legislature to define the unauthorized practice of law by statute. At some juncture, the constitutional doctrine of separation of powers is involved, at least with respect to the definition of the unauthorized practice of law in a judicial branch court. Nicollet Restoration, Inc. v. Turnham, supra. The Administrative Law Judge cannot, however, declare a statute unconstitutional and even the judicial branch courts have attempted to apply the statute in defining the unauthorized practice of law.

It should be noted initially, that the general prohibition in the statute against a person other than an attorney appearing in any action or proceeding or otherwise holding himself or herself out as qualified to give legal advice or counsel, relates to actions or proceedings in courts of the State. In a number of decisions, Minnesota courts have held that statutes which relate to actions or proceedings in a court do not include administrative proceedings. Minn. Stat. 645.45(2) (1992), defines an action as, "any proceeding in any court of this state" (emphasis added). In a series of cases, the Minnesota courts have interpreted the word "action" to apply to a proceeding brought in a judiciary branch court. Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 218 N.W.2d 751, 754 (Minn. 1974); Spiva v. American Standard Insurance Co., 361 N.W.2d 454, 457 (Minn. App. 1985); Muirhead v. Johnson, 46 N.W.2d 502, 505 (Minn. 1951); In re Wage and Hour Violations of Holly Inn, 386 N.W.2d 305, 307 (Minn. App. 1986); Bednarek v. Bednarek, 430 N.W.2d 9 (Minn. App. 1988).

Several foreign jurisdiction have recognized that a statute relating to the unauthorized practice of law which prohibits appearances in an action or proceeding before a court of the state does not apply to a contested case proceeding which is not brought in a judicial forum. State Bar of Michigan v. Galloway, 335 N.W.2d 475, 478 (Mich. App. 1983); aff'd, 369 N.W.2d 839 (Mich. 1983). Division of Alcoholic Beverage Control v. Bruce Zane, Inc., 239 A.2d 28, 31 (Sup. Ct. App. Div. 1968).

The Minnesota State Supreme Court has, however, applied the concept of the unauthorized practice of law prohibited by Minn. Stat. 481.02, subd. 1 (1992), to a number of situations, broader than simply representing parties in a judicial branch court. Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934); Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951). Hence, it must be determined under what circumstances, if at all, the

representation of a party by a non-attorney in an administrative contested case proceeding constitutes the unauthorized practice of law.

The Department argues that the state of Minnesota law is unclear as to the right of a non-attorney to represent either a corporation or another individual in a contested case proceeding. The Department, rather, generally equates an administrative proceeding with language from Minnesota judicial decisions dealing with representation in judicial branch courts. The only arguable exception to this characterization of the Department's argument is the conclusion by the Supreme Court in In re Jorissen, 391 N.W.2d 822, 824-25 (Minn. 1986), that a suspended attorney engaged in the authorized practice of law by, inter alia, appearing on behalf of a party in a workers compensation court of appeals matter. See also, Op. Atty. Gen. 270 (1939); Op. Atty. Gen. 523-1-29 (Mar. 17, 1970). In Jorissen, supra, however, the court was dealing with a situation in which a suspended attorney engaged in a variety of conduct, including several appearances before judicial branch courts. Without analysis, the court merely concluded that the totality of his conduct amounted to the unauthorized practice of law. As noted by the court in that case, however, the individual had been a licensed attorney and, hence, was held to a higher standard than would a layperson. Matter of Discipline of Jorissen, 391 N.W.2d 822 at 825. The court cited with approval the decision of the North Dakota Supreme Court in In re Christianson, 215 N.W.2d 920, 925-26 (N.D. 1974), as follows:

> When professional expertise enters into the activity and when the activity is one which is customarily performed by lawyers, then such activity is forbidden to a suspended attorney even though under some conditions members of other professions may sometimes be allowed to perform the same acts.

In a similar disciplinary action against a suspended attorney, the Supreme Court of Wisconsin, on the same rationale, reached an identical result. Petition of Eisenberg, 291 N.W.2d 565 (Wis. 1980).

In contrast to the holding in Jorissen, supra, which involved a suspended attorney acting in essentially a fraudulent manner, the Minnesota courts have sanctioned the appearance of non-attorney representatives in some agency proceedings. In Gonsior v. Alternative Staffing, Inc., 390 N.W.2d 801 (Minn. App. 1986), the court did not invalidate a proceeding before a referee in an unemployment compensation matter and a review by a Commissioner's representative even though that employee was represented by her boyfriend, a non-attorney. The court did dismiss the appeal to the Court of Appeals on the basis of the unauthorized practice of law, since the appeal to a judicial branch court constituted the unauthorized practice of law within Minn. Stat. 481.02, subd. 1 (1984). Similarly, in Hermann v. Viereck Fireplace Sales, Inc., 406 N.W.2d 603, 604 (Minn. App. 1987), the Minnesota Court of Appeals did not invalidate a proceeding before an unemployment compensation referee or a commissioner's representative even though the employee was

represented by his mother. The court, again, dismissed the appeal to the Court of Appeals because it was improperly brought in a judicial branch court by a non-attorney.

In Contemporary Systems v. Commissioner of Jobs, 431 N.W.2d 133 (Minn. App. 1988), relied upon by the Department, the court specifically stated:

> In proceedings before the Department of Jobs and Training, a party may be represented by a non-attorney agent; however, in court proceedings such agent must be an attorney at law. Minn. Stat. 268.10, subd. 9 (1986).

431 N.W.2d at 134.

The court dismissed the appeal to the Court of Appeals because the employee was attempting to represent his Subchapter S corporation in a judicial branch court appeal. 431 N.W.2d at 134. The president of the corporation was allowed, however, to represent his Subchapter S corporation before the referee and the Commissioner's representative in the administrative proceeding. Finally, in Wicker Enterprises, Inc. v. Dahler, 347 N.W.2d 543 (Minn. App. 1984), the court did not invalidate administrative proceedings before a referee and the Commissioner's representative when the employer's corporate president represented the employer at the administrative proceedings. As in all other cases, the court did dismiss the appeal to a judicial branch court, citing Minn. Stat. 481.02 (1982) and Cary & Company v. F.E. Satterlee & Co., 166 Minn. 507, 208 N.W. 408 (1926). Contrary to the argument of the Department, therefore, the Minnesota Court of Appeals has repeatedly recognized the right of non-attorney representatives to appear in administrative proceedings, where the rights of employers and employees have been specifically determined.

If the conduct of Mr. Hughes is within any of the exceptions to the unauthorized practice of law contained in Minn. Stat. 481.02, subd. 3 (1993), which really only apply to judicial proceedings, the Administrative Law Judge must find that his conduct does not constitute the unauthorized practice of law in an administrative proceeding. Although the Administrative Law Judge questions a strict application of the judicial model contained in Minn. Stat. 481.02, subd. 1 and 2 (1993), to a contested case proceeding, no one argues that the restrictions on non-attorney representation in a contested case proceeding should be any greater than in a judicial branch court. If anything, because of the presence of more informality and the desire for a speedy remedy, the restrictions should be significantly less stringent. Moreover, the Administrative Law Judge does not have authority to declare a statute unconstitutional. Wronski v. Sun Oil Co., 108 Mich. App. 1978, 310 N.W.2d 321 (Mich. App. 1981); Starkweather v. Blair, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (Minn. 1955); First Bank v. Conrad, 350 N.W.2d 580 (N.D. 1984). If the Legislature has allowed certain conduct in Minn. Stat. 481.02, subd. 3 (1993), the Administrative Law Judge must consider that statute constitutional and apply it to administrative proceedings. He does not have authority under the

guise of the separation of powers doctrine to ignore or declare such definitions by the Legislature to be a usurpation of the inherent authority of the Minnesota State Supreme Court.

It is not even clear, however, that a definition of the unauthorized practice of law in an administrative proceeding by the Legislature would involve considerations of the constitutional doctrine of separation of powers. In State Bar of Michigan v. Galloway, 335 N.W.2d 475 (Mich. App. 1983), the Michigan Court of Appeals held that the Legislature, not the judicial branch, has the authority to define the unauthorized practice of law, as regards executive branch agencies. The court stated:

> Administrative agencies such as the MESC are created by the Legislature pursuant to its power to delegate nonlegislative functions to such agencies. . . . We do not believe the judiciary has the inherent power to assert ultimate authority over the practice of law in proceedings before the MESC. An attempted exercise of such authority would violate the separation powers doctrine. . . . However wise or unwise the Legislature's decision to allow employers to be represented by nonattorney agents before the MESC, the court may not disturb that decision.

335 N.W.2d at 480. The Michigan Supreme Court, in State Bar of Michigan v. Galloway, 442 Mich. 188, 369 N.W.2d 839 (Mich. 1985), affirmed the decision of the Michigan Court of Appeals. Similarly, in Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980), the Florida Supreme Court held that the Florida Legislature had the authority to define the practice of law in administrative proceedings and therefore oust the authority of the state supreme court to do so without violating the doctrine of separation of powers.

The Administrative Law Judge does note the existence of judicial decisions in which judicial branch appellate courts have held that such courts, and not the Legislature, have the inherent authority to define the practice of law to exclude non-attorney representation before administrative agencies. Unauthorized Practice of Law v. Employers Unity, Inc., 716 P.2d 460 (Colo. 1986); Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120 (D.C. App. 1988); Reed v. Labor and Industrial Relations Committee, 789 S.W.2d 19 (Mo. 1990); Clark v. Austin, 101 S.W.2d 977 (Mo. 1937).

For purposes of this analysis, however, the speculation concerning application of the constitutional doctrine of separation of powers and whether the Legislature or the Minnesota State Supreme Court has the final authority to define the practice of law in the context of the appearance of non-attorneys before administrative agencies is largely academic. The Administrative Law Judge must apply to this case and to contested cases generally the exceptions contained in Minn. Stat. 481.02, subd. 3 (1993), which the Legislature has authorized, either expressly or by appropriate implication.

Minn. Stat. 481.02, subd. 3 (16) (1993), authorizes an officer, shareholder, director, partner, or employee to appear on behalf of a corporation, partnership, sole proprietorship, or association in conciliation court or in district court in an action that was removed from conciliation court. In Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn. 1992), relied upon by the Department, the Minnesota court held that in a judicial branch proceeding, a non-attorney agent could not appear on behalf of a corporation in district court even though it had been removed from conciliation court. The court characterized its holding in Cary & Co. v. F.E. Satterlee & Co., 166 Minn. 507, 208 N.W. 408 (1926), as still stating the appropriate rule. That case held that a disbarred attorney could not appear for his corporation in district court even if he owned all of the stock of the corporation. The Department, in its brief, quotes at length from Nicollet Restoration, Inc. v. Turnham, supra. That decision also discusses the application of the doctrine of separation of powers, citing Sharood v. Hatfield, 296 Minn. 416, 425, 210 N.W.2d 275, 280 (1973), also relied upon by the Department.

It is important to note that Nicollet Restoration, Inc. v. Turnham, supra, speaks to a judicial branch court and not an administrative proceeding. Moreover, the amendment to Minn. Stat. 481.02, subd. 3 (16) (1993), adopted after the Nicollet Restoration, Inc. v. Turnham case, contains a determination by the Legislature that at least in small-issue legal proceedings, even in a judicial branch court, a non-attorney agent of a corporation may appear. As previously discussed, the Administrative Law Judge does not have authority to declare a statute unconstitutional. He must conclude that if a non-attorney may appear for a corporation in a judicial branch court in a conciliation court matter, a non-attorney agent for the corporation may appear in a contested case proceeding, at least when the issues involved may be truly likened to a conciliation court matter.

The argument of the Department, applying in toto the judicial model to administrative proceedings, is completely unrealistic. It was the theory of administrative law that in a more relaxed proceeding, efficient and fair justice might be rendered in matters requiring specialized knowledge. Administrative agencies were meant to be an alternative to a judicial branch court, not an alter ego. The cases before the Office of Administrative Hearings vary from the most complex, like a utility matter involving hundreds of millions of dollars annually, to a simple case involving only hundreds of dollars or less, or a minor penalty. The argument of the Department wholly overlooks this reality. It rejects any application of the conciliation court exception to administrative practice because in its mind the hearings are infinitely more complex. The Department states that the government is always represented by the Office of the Attorney General, unlike conciliation court proceedings. Therein lies the problem. Even in a minor matter involving a very small monetary penalty, the State is represented by counsel without budgetary constraints. The opposing party, it is argued, must be forced to hire an attorney to safeguard minor monetary amounts

merely because the State has, in effect, "free legal representation" available to it, or at least ready access to the public purse. That argument involves not only a non sequitur, but it results in a substantial injustice. The effect of the argument of the Department would be to virtually deny a hearing to any party who was not an individual when the relief requested did not justify hiring counsel. As will be discussed at a later juncture in this Memorandum, the Administrative Law Judge believes there is an appropriate exception to the requirement of attorney representation in the case of an entity involved in an administrative matter where the amount in controversy or the relief requested does not justify, monetarily, the hiring of an attorney. Such cases might include OSHA, Board of Health nursing home fine cases, and other cases involving the imposition of a minor monetary penalty.

Minn. Stat. 481.02, subd. 3 (15) (1993), authorizes the sole shareholder of a corporation to appear on behalf of the corporation in a judicial branch court. Apparently, the purpose of this 1992 amendment to the statute was to eliminate the rule announced in Cary & Co. v. F.E. Satterlee & Co., 166 Minn. 507, 208 N.W. 408 (1926). In that case, also relied upon by the Department, the court held that a disbarred attorney could not appear in a judicial branch court on behalf of a corporation even though he owned all of the capital stock of the corporation. As previously discussed, the Administrative Law Judge does not have the authority to declare a statute unconstitutional. Since, under Minn. Stat. 481.02, subd. 3 (15) (1993), the sole shareholder may appear on behalf of the corporation in a judicial branch court, at least the same must be true in a contested case proceeding. Irrespective of separation of powers arguments, the Legislature has clearly determined that an exception to the Cary doctrine should apply in contested case proceedings at least with respect to extremely closely held corporations.

It is appropriate to note that Cary, supra, involved an attorney who was not authorized to practice law for disciplinary reasons. As previously discussed, a disbarred or disciplined attorney is held to a higher standard of conduct and his actions are subject to significantly more scrutiny than would be those of a layperson. Matter of Discipline of Jorissen, 391 N.W.2d 822, 825 (Minn. 1986).

Minn. Stat. 481.02, subd. 3 (5) (1992), allows a bona fide labor organization to give legal advice to its members in matters arising out of their employment. A number of courts have specifically held, irrespective of separation of powers arguments, that assisting employees in employment-related contested cases does not constitute the unauthorized practice of law. In Henize v. Giles, 490 N.E.2d 585 (Ohio 1986), the court held that due to the differences between court proceedings and administrative proceedings, persons representing parties before an unemployment compensation department did not engage in the unauthorized practice of law. The court specifically addressed the differences between administrative practice and a judicial branch court. 490 N.E.2d at 587-88. In State ex rel. Pearson v. Gould, 437 N.E.2d 41 (Ind. 1982), the court held that a

non-attorney representative appearing on behalf of an employee at the hearing level and before the State Employees' Appeals Commission did not engage in the unauthorized practice of law. Once again, unlike the Department, the court examined the differences between the judicial model and the administrative proceeding at issue and found sufficient distinctions to allow non-attorney representation. 437 N.E.2d at 43. In Florez v. City of Glendale, 463 P.2d 67 (Ariz. 1969), the court held that the representation of an employee by a non-attorney before the city personnel board constituted the unauthorized practice of law and prohibited the practice. However, in Hunt v. Maricopa City Employment Merit System, 619 P.2d 1036 (Ariz. 1980), the court held that non-attorneys could appear in a quasi-judicial administrative hearing involving personnel matters if no fee was involved, the subject matter of the hearing had a value of $1,000 or less and attorney representation was unlikely. The Administrative Law Judge believes that the Arizona Supreme Court, between 1969 and 1980, recognized the realities involved in administrative hearings involving employees, but desired to preserve its prerogative inviolate under the separation of powers doctrine. The Administrative Law Judge believes that Minn. Stat. 481.02, subd. 3 (5) (1992), provides a recognized exception in employment-related contested cases, at least as regards an employee union representative.

Although not specifically recognized in Minn. Stat. 481.02 (1993), in any contested case proceeding, a natural individual has a constitutional right to represent himself or herself unless that individual is of such age or disability as not to be able to participate effectively in a contested case proceeding. Hawkeye Bank & Trust v. Baugh, 463 N.W.2d 22, 23 (Iowa 1990); Idaho State Bar Association v. Idaho Public Utilities Commission, 637 P.2d 1169, 1172 (Idaho 1981); Magnolias Nursing & Convalescent Center v. Department of Health, 428 So.2d 256, 257 (Fla. App. 1982); Reed v. Labor and Industrial Relations Commission, 789 S.W.2d 19, 21 (Mo. 1990).

The brief of the Department asserts that the case-law from foreign jurisdictions almost universally supports its position that a corporation must be represented by an attorney in a contested case proceeding. Some relevant judicial authority is included in Annotation, Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not Attorney, 8 ALR 5th 653 (1992). The Administrative Law Judge believes that the case-law from foreign jurisdictions is generally of two types, as regards administrative practice. Some courts, recognizing that administrative law was meant to be simpler and more expeditious than a judicial branch proceeding, have allowed non-attorney representation of corporations and others. The asserted problem of separation of powers is either avoided by recognizing the authority of the Legislature or the conduct is defined as not involving the practice of law. See, e.g., State Bar of Michigan v. Galloway, 335 N.W.2d 475 (Mich. App. 1983), aff'd, 369 N.W.2d 838 (Mich. 1985); Ross v. Industrial Commission, 566 P.2d 367, 369 (Col. App. 1977); Henize v. Giles, 490 N.E.2d 585 (Ohio 1986); State ex rel. Pearson v. Gould, 437 N.E.2d 41 (Ind. 1982); Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120 (D.C. App. 1988). These courts have recognized that

administrative proceedings do not and should not partake directly of the judicial model and that to require the appearance of an attorney in many such proceedings would effectively deny a remedy.

Although rendered in a bankruptcy proceeding, the Administrative Law Judge believes that the best statement of the more modern position is contained in Matter of Holliday's Tax Service, Inc., 417 F. Supp. 182 (E.D.N.Y. 1976). In that case, the court dealt with a closely held corporation's representation by its sole shareholder in a bankruptcy proceeding. The court specifically considered the same arguments advanced by the Department and rejected each of them specifically. Other judicial branch courts, in some circumstances, have also departed from the general common law rule in an appropriate case. See, e.g., Margaret Maundez Assoc., Inc. v. A-Copy, Inc., 40 Conn. Supp. 361, 363-65, 499 A.2d 1172, 1174 (1985); Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 167, 266 A.2d 698, 702 (1970).

Many jurisdictions, without analysis, have merely applied the judicial model to administrative hearings irrespective of the character of the proceedings. Those courts, in a position similar to that of the Department, argue that appearing in a contested case proceeding on behalf of a party requires the exercise of legal skill and hence constitutes the practice of law. Under the definition of the doctrine of separation of powers used, again without analysis, only the state supreme court has inherent authority to authorize appearances by non-attorneys, except for the constitutional right of a natural person to represent himself or herself. As previously discussed, the Minnesota Court has not adopted this position, at least as regards unemployment compensation hearings. Gonsior v. Alternative Staffing, Inc., 390 N.W.2d 801 (Minn. App. 1986); Hermann v. Viereck Fireplace Sales, Inc., 406 N.W.2d 603 (Minn. App. 1987); Contemporary Systems Design v. Commissioner of Jobs and Training, 431 N.W.2d 133 (Minn. App. 1988); Wicker Enterprises, Inc. v. Dahler, 347 N.W.2d 543 (Minn. App. 1984).

Representative cases taking the approach suggested by the Department are stated at footnote 10 of the Department's Memorandum of Law in Support of Its Motion to Dismiss, at page 14. As previously discussed, the cases decided by our Court of Appeals authorizing lay representation before the Unemployment Compensation Commission are contrary to Kyle v. Beco Corp., 707 P.2d 378 (Idaho 1985); and Kentucky State Bar Association v. Henry Vogt Machine Co., 416 S.W.2d 727 (Ky. 1967). Another court has rejected Clark v. Austin, 101 S.W.2d 97 (Mo. 1937) and Public Service Commission v. Hahn, 253 A.2d 845 (Md. 1969), at least when the representative before the public service or public utilities commission is an officer of the corporation or nonprofit corporation and does not represent such parties for a business. Idaho State Bar Association v. Idaho Public Utilities Commission, 637 P.2d 1168 (Idaho 1981).

Additional examples of the position taken by the Department not cited by the Department include Office of Disciplinary

Council v. Molnar, 567 N.E.2d 1355 (Ohio Bd. Unauth. Prac. 1990); Slimm v. Yates, 566 S.2d 561 (N.J. Super. Ch. 1989); State v. Wells, 5 S.E.2d 181 (S.C. 1939).

From the foregoing discussion, the Administrative Law Judge concludes that a number of exceptions to a requirement of attorney representation are appropriate in contested case proceedings, particularly when the individual appears on behalf of a party to protect his or her own interest and does not perform the service as a business.

Initially, as previously discussed, an individual always has a constitutional right to appear on his or her own behalf as a natural person in a contested case proceeding.

The second exception applies in the case of extremely simple hearings involving a small amount of money or relief which would not justify the expense of hiring an attorney by a party, even a corporation. See, Gonsior v. Alternative Staffing, Inc., 390 N.W.2d 801 (Minn. App. 1986); Hermann v. Viereck Fireplace Sales, Inc., 406 N.W.2d 603 (Minn. App. 1987); Contemporary Systems Design v. Commissioner of Jobs, 431 N.W.2d 133 (Minn. App. 1988); Wicker v. Dahler, 347 N.W.2d 545 (Minn. App. 1984); Ross v. Industrial Commission, 566 P.2d 367 (Col. App. 1977); Unauthorized Practice of Law Committee v. Employers Unity, Inc., 716 P.2d 460 (Col. 1986); Hunt v. Maricopa County Employees Merit System Commission, 619 P.2d 1036 (Ariz. 1980); Denver Bar Association v. Public Utilities Commission, 391 P.2d 467 (1964); Henize v. Giles, 490 N.E.2d 585 (Ohio 1986); Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120 (D.C. $SS 0LQQ 6WDW 481.02, subd. 3 (16) (1993).

The Administrative Law Judge also believes that an exception on behalf of a corporation to appear by an officer or employee in a contested case proceeding, at least when the corporation is a closely held small corporation, in the absence of evidence of shareholder disputes or conflicts of interest. Margaret Maundez Associates, Inc. v. A-Copy, Inc., 40 Conn. Supp. 361, 363-65, 499 A.2d 1172, 1174 (1985); Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 167, 266 A.2d 698, 702 (1970); Matter of Holliday's Tax Service, Inc., 417 F. Supp. 182, 184 (E.D.N.Y. 1976); Idaho State Bar Association v. Idaho Public Utilities Commission, 637 P.2d 1168 (Idaho 1981); Magnolias Nursing & Convalescent Center v. Department of Health, 428 So.2d 256 (Fla. App. 1982); North Miami General Hospital, ,QF Y 3OD]D 6R G)OD $SS 0LQQ 6WDW 481.02, subd. 3 (15) (1993). But see, Reed v. Labor and Industrial Relations Commission, 789 S.W.2d 19 (Mo. 1990); State v. Wells, 5 S.E.2d 181 (S.C. 1939).

To apply a different rule would result in the denial of a remedy in many situations. In numerous Transportation Regulation Board hearings, for example, many parties and protestants are small, unsophisticated operations with a minimum of capital and equipment. They wish to be heard in a semi-informal setting but can't afford counsel. To require counsel would be to deny a hearing. The Department argues that this is something such businesses must endure because they are corporations and it is

necessary for the convenience of the tribunal. The first observation by the Department is a conclusion or statement, not an argument or reason. The second need suggested by the Department misstates the purpose of administrative law. When the convenience and smooth functioning of the system become more important than affording a just hearing, the system is self-defeating. It was precisely to avoid that result that administrative law was initially created.

It could be argued that allowing non-attorney representatives for any corporation, irrespective of size, in a contested case proceeding is appropriate. If the corporation chooses a non-attorney representative associated with the corporation, little harm to the public would result. At least one court has approved such a rule. Idaho Bar Ass'n v. Idaho Public Utilities Commission, supra. The Administrative Law Judge need not decide that question for purposes of this motion.

As previously discussed, the Administrative Law Judge also believes that an additional exception should be found to exist with respect to an employee's representation in an employment-related hearing by a union representative. See, Hunt v. Maricopa City Employment Merit System Commission, 619 P.2d 1036 (Ariz. 1980); State ex rel. Pearson v. Gould, 437 N.E.2d 41 (Ind. 1982); Henize v. Giles, 490 N.E.2d 584 (Ohio 1986); Florida %DU Y 0RVHV 6R G)OD 0LQQ 6WDW 481.02, subd. 3 (5) (1992).

A final possible exception may also relate to individuals who though not attorneys represent other individuals and corporations as a business. The Administrative Law Judge need not decide whether such representatives may appear in contested case proceedings to determine this motion. A number of courts recognizing the need to protect the public from unscrupulous practitioners have, however, declared such conduct to be the unauthorized practice of law, even in administrative proceedings. Lukas v. Bar Association of Montgomery County, 371 A.2d 669 (Md. App. 1977); Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980); State v. Keller, 123 N.W.2d 905 (Wis. 1963); Idaho State Bar Association v. Idaho Public Utilities Commission, 637 P.2d 1168 (Idaho 1981); Office of Disciplinary Council v. Molnar, 567 N.E.2d 1355 (Ohio Bd. Unauth. Prac. 1990); Slimm v. Yates, 566 A.2d 561 (N.J. Super. Ch. 1989). The Administrative Law Judge does not see any decided need to foster a class of non-lawyers who do not have legal skill and could easily misrepresent to the public their role or efficacy. However, that is not the case here, where Frank Hughes seeks to represent Beacon Builders, Inc.

In applying the previous discussion to the facts of this proceeding, it is clear to the Administrative Law Judge that the exception relating to a closely held family corporation applies to Beacon Builders, Inc. Mr. Frank Hughes created the closely held corporation; the shares are held in trust for immediate family members, including several handicapped children of Mr. Hughes. Mr. Hughes founded the corporation and has been associated with it in some capacity since its inception. He currently claims to be president of the corporation. There is no

evidence in the record that Mr. Hughes is not currently the president of the corporation. The Administrative Law Judge, therefore, finds that Mr. Hughes' representation of Beacon Builders, Inc. in this contested case proceeding does not constitute the unauthorized practice of law under Minn. Stat. 481.02, subd. 1 (1992). Since the representation of the corporation by Mr. Hughes does not constitute the unauthorized practice of law, it is allowed by Minn. Rule pt. 1400.5800 (1991). It would be inappropriate to dismiss the appeal on the ground suggested.

As a second basis for its Motion, the Department argues that Mr. Frank Hughes should be equitably estopped from now claiming to be president of Beacon Builders, Inc. in this contested case proceeding because, in 1992, at the time the corporation received its license from the State of Minnesota, Mr. Daniel J. Hughes was listed as the president of the corporation. The Department apparently argues that Mr. Hughes concealed his position as an officer of Beacon Builders, Inc. because of a checkered financial history that might have jeopardized a grant of the license. The Department has attached to its Memorandum of Law in Support of Its Motion to Dismiss a number of affidavits and documentation showing that, at various times, Mr. Frank Hughes identified himself as president of Beacon Builders, Inc., but did not do so in May of 1992, when the application for licensure was submitted to the Department of Commerce.

The elements of equitable estoppel are listed at page 18 of the Department's Memorandum of Law in Support of Its Motion to Dismiss. The Administrative Law Judge does not apply the doctrine of equitable estoppel in this case for a number of reasons. Initially, the Department has not established that Mr. Hughes, at the time of the license application, was, in fact, president of Beacon Builders, Inc. The facts that are presented to support an equitable estoppel claim must be clear, positive, and unequivocal in their implication. Eliason v. Production Credit Association, 259 Minn. 134, 106 N.W.2d 210 (1960).

The touchstone of the claim of equitable estoppel is that there would be significant harm or that it would be unconscionable if a party were allowed to take advantage of his wrongful conduct. In this case, Beacon Builders, Inc. is only seeking a contested case hearing on a Cease and Desist Order issued by the Commissioner. It is not seeking any affirmative benefits from the government. Moreover, the proceeding does not seek to revoke the license of Beacon Builders, Inc. for Mr. Frank Hughes' wrongful conduct. The Department believes that Mr. Frank Hughes concealed his identity as president of the corporation in May of 1992 when it received a license from the State of Minnesota. If that conduct can be established, grounds for revocation would exist under Minn. Stat. 326.91 (1992). The appropriate way for the Department to accomplish its objective, if they desire to protect the public interest, is not to deny Mr. Frank Hughes and Beacon Builders, Inc. a contested case hearing on disputed facts in an unrelated claim, but to begin a revocation proceeding. The Department apparently agrees with this reasoning of the Administrative Law Judge because it has

recently instituted a second proceeding to revoke the license of Beacon Builders, Inc. on precisely the same grounds now asserted to support the claim of equitable estoppel. Rather than make conclusions from affidavits and speculate about underlying facts to deny Mr. Frank Hughes and Beacon Builders, Inc. a contested case hearing in an unrelated matter, the Administrative Law Judge believes it is more appropriate to hold a hearing in a proceeding specifically brought for the purpose of revocation.

The Administrative Law Judge, therefore, does not apply the doctrine of equitable estoppel to Mr. Hughes to deny a hearing in this contested case proceeding. In re New Ulm Telecom, Inc., 399 N.W.2d 111, 122 (Minn. App. 1987).

B.D.C.